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ABSTRACT

This document presents the testimony of Rosslyn Kleeman, the senior associate director for the General Government Division of the United States General Accounting Office (GAO), before the Senate Committee on Governmental Affairs. It discusses the work being done by the GAO in a study of the operations of advisory committees within a number of departments and agencies, focusing on compliance with the Federal Advisory Committee Act (FACA) and General Services Administration (GSA) regulations by advisory committees at the National Institutes of Health and the Food and Drug Administration, and on the formation and initial operations of the President's Commission on the Human Immunodeficiency Virus Epidemic--known as the President's Commission on AIDS (Acquired Immune Deficiency Snydrome). Progress on work at the NIH and FDA is briefly reviewed, while the majority of the testimony concentrates on work at the President's Commission on AIDS. Requirements of the executive orders signed to establish and amend the commission are listed and pending litigation involving the commission is discussed. Other sections of the testimony focus on the GAO's methodology in conducting the study of the commission, the AIDS Commission's compliance with FACA and GSA Commission chronology, and the Department of Health and Human regulations, the AIDS Services support to the AIDS Commission. (NB)

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The President's Commission on AIDS

Statement of
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General Government Division

Before the
Committee on Governmental Affairs
United States Senate

U.S. DEPARTMENT OF EDUCATION
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Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the progress of the work we are doing at your request on the Federal Advisory Committee Act (FACA). In considering and passing FACA in 1972, Congress endorsed the concept of using committees of private citizens to advise federal officials in the exercise of their responsibilities, recognizing that this mechanism could make available information, perspective, and insight to the formulation of public policy. The FACA, Public Law 92-463, as amended, prescribes uniform procedures for the establishment, operation, administration, and termination of advisory committees. During fiscal year 1986, the General Services Administration (GSA) reported that 56 departments and agencies sponsored 997 advisory committees at a cost to the agencies of about $82.5 million. According to GSA, the 997 committees had a total of 24,600 members, held 3,519 meetings, and issued 666 reports.

On September 21, 1987, you requested that we undertake a study of the operations of advisory committees within a number of departments and agencies. In subsequent discussions with your office, we agreed to focus initially on (1) compliance with FACA and GSA regulations by advisory committees at the National Institutes of Health (NIH) and the Food and Drug Administration (FDA), and (2) the formation and initial operations of the AIDS Commission.

Progress of our work at NIH and FDA

NIH has 162 federal advisory committees. In 2 committees, members are appointed by the President; in 30 committees, members are appointed by the Secretary, HHS; and in 130 committees, members are appointed by the Director, NIH. These committees function as either scientific review groups or program advisory groups. Scientific review groups are to be composed exclusively of experienced investigators with highly developed expertise in specific scientific disciplines or medical specialty areas. Their primary function is to determine the scientific merit of research grant applications and contract programs. Program advisory groups are to be composed of biomedical scientists and leaders in such fields as education, law, social studies, public health, and public affairs.

To date, we have obtained data for 1986 and/or 1987 for six NIH advisory committees--two scientific review and four program advisory groups. So far we found that:

-- The charters contained all the elements required by FACA.
-- Announcements of advisory committee meetings were published in the Federal Register 15 days in advance as required by GSA regulations.

-- Minutes of meetings for 1986 contained detailed information about matters discussed and actions taken as required by FACA and GSA regulations.

We only recently began work at FDA. So far we have held entrance conferences and have begun to interview FDA officials. We have obtained documents on FDA's management of advisory committees and selected six advisory committees to see if they adhered to FACA requirements.

We will report to you on FDA and NIH work at a later date.

Results of our Work at the President's Commission on AIDS

On June 24, 1987, the President signed Executive Order 12601 which established the Presidential Commission on the Human Immunodeficiency Virus Epidemic -- commonly known as the AIDS Commission. The Order specified that the Commission should:

-- have 11 members whom the President appoints or designates, with one serving as Chairman, and who are distinguished by their experience in medicine, epidemiology, virology, law, insurance, education and public health.

-- advise the President, the Secretary of HHS, and other

relevant Cabinet heads on the public health dangers, including the medical, legal, ethical, social and economic impacts from the virus and resulting illnesses.

-- recommend actions that federal, state, and local officials can take to: 1) protect the public from acquiring the virus; 2) find a cure; and 3) care for those who have the disease.

-- 1) evaluate efforts to provide education and information on AIDS; 2) analyze efforts to combat AIDS; 3) examine the long-term impact of AIDS treatment on health care delivery systems; 4) review how the U.S. has dealt with communicable disease epidemics; 5) evaluate research on AIDS' prevention and treatment; 6) identify future research to address AIDS; 7) examine policies for developing and releasing drugs and vaccines to combat AIDS; 8) assess the progression of AIDS among the general population and specific risk-groups; 9) study legal and ethical issues on AIDS; and 10) review the U.S. role in dealing with AIDS in the international setting.

-- make a preliminary report to the President not later than 90 days after its members are first appointed or designated, and submit its final report no later than one year from the date of the Order.

-- terminate, unless extended, 30 days after submitting its

final report to the President.

The Order allowed Commission members to be compensated for their work at the daily rate of GS-18, and for travel expenses. It also required the Office of the Secretary of HHS to provide administrative support services, staff and funds as needed for the Commission to perform its functions. Heads of executive departments and agencies, to the extent permitted by law, are required to cooperate by providing needed information and administrative support.

Executive Order 12603, signed by the President on July 16, 1987, amended the initial executive order to increase the number of members on the Commission from 11 to 13.

On July 23, 1987, the Secretary of HHS signed the Commission's charter. Essentially, this charter restated the requirements of the amended executive order. The charter also specified, as required by FACA, other information on the Commission's structure and operation, such as:

-- The members shall be invited to serve for the life of the Commission.

-- The Office of the Secretary, HHS, shall be responsible for management and support services.

-- Meetings shall be held as needed at the call of the Chair with advance approval by a government official, who also shall approve the agenda and attend all meetings. Meetings shall be conducted and recorded as required by law and HHS regulations.

-- The estimated annual cost for the Commission is $1,350,000, including $950,000 for compensation and travel expenses of members and $400,000 for staffing at 8 staff-years.

Pending litigation

Currently, litigation involving the Commission is pending in National Association of People with AIDS v. Reagan, No. 87-2777 (D.D.C. October 14, 1987). On October 14, 1987, a coalition of civil rights and public health groups filed suit in the U.S. District Court for the District of Columbia, alleging that the AIDS Commission does not meet FACA's requirement that an advisory committee's membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. I., section 5(b)(2). Specifically, the plaintiffs' complaint alleges that the Commission lacks representatives of groups most directly affected by its work and includes some members whose "extreme viewpoints" are not balanced by those with "more mainstream views." The

plaintiffs' complaint requests a declaratory judgment that the AIDS Commission is not fairly balanced, as well as an injunction barring the Commission from taking any further action until balanced membership is achieved.

On October 23, 1987, the Department of Justice filed its brief opposing the plaintiff's request for an injunction. Justice maintains that the Commission membership, as constituted, is balanced in terms of functions to be performed, and is drawn from a wide range of backgrounds and points of view. The district court has not yet issued a decision on the injunction.

Scope of our work

Because of the litigation, we agreed with HHS that, during our interviews with the Commission members and staff, HHS attorneys would be present and we would not ask questions about certain subjects which HHS attorneys believed were related to the litigation. Specifically, we did not discuss (1) personality conflicts between Commission members; (2) points of view of individual Commission members; (3) the substance of the Commission's work; (4) the selection and appointment of individual Commission members; (5) the qualifications of Commission members; and (6) the Commission's representation of particular groups or points of view.

We interviewed 10 Commission members, the former Vice Chairman, the former senior advisor for economics and international affairs, the former senior advisor for medical affairs, and an associate of the former Chairman who assisted him at the Commission. The former Chairman declined to be interviewed. We also interviewed Public Health Service officials about administrative support they provided to the Commission.

We examined contracts, purchase orders, and memoranda pertaining to administrative support provided to the Commission by HHS. We also reviewed minutes of Commission meetings, available personnel records of Commission members and staff and available memoranda exchanged between the former Chairman and Commission members.

AIDS Commission Compliance With FACA and GSA Regulations

Under FACA, federal agencies must meet certain requirements in establishing and operating advisory committees. These requirements and the actions taken with regard to them for the AIDS Commission include:

-- Designating a committee management officer who controls the establishment and operation of advisory committees. The Department of Health and Human Services designated

Mr. Richard Loughrey, Director, Advisory Committee Office as the Advisory Committee Management Officer.

-- Consulting with and filing a charter with the GSA for each committee established. The consulting requirement is not applicable to Presidential advisory committees. As required by FACA, the AIDS Commission charter contains (1) the Commission's official designation; (2) the Commission's objectives and scope of activity; (3) the period of time necessary to carry out the Commission's purpose; (4) the official to whom the Commission reports, (5) the agency responsible for providing the necessary support; (6) a description of the duties for which the Commission is responsible; (7) the Commission's estimated annual operating costs; (8) the estimated number and frequency of meetings; (9) the Commission's termination date; and (10) the date the charter was filed.

-- Maintaining a committee's documents available for public inspection and copying in one location. According to AIDS Commission representatives, documents are made available upon request. Our tests in this area were inconclusive.

-- Ensuring that a committee's membership provides balance in terms of points of view represented and functions to be performed, and is not inappropriately influenced by the appointing authority or special interests. Because the AIDS Commission's compliance with the balance requirement is the subject of a lawsuit, we did not review this issue.

-- Notifying the public, through the Federal Register, when and why a meeting will be closed to the public, and summarizing the closed meetings in an annual report. Only one of the AIDS Commission's meetings held thus far was closed to the public. Closure of the meeting was requested and approved on the basis that the Commission would be discussing internal personnel rules and practices and matters which, if disclosed, would constitute an invasion of personal privacy. However, the minutes of the closed meeting reveal that the Commission devoted very little time to discussing personnel matters. Instead, the primary topic of the Commission's discussion was the subject matter areas to be assigned to the Commission's subgroups.

-- Assigning to each committee a designated federal official who is to attend each meeting and adjourn meetings when doing so meets the public's interest.

The designated federal official for the AIDS Commission is its executive director. According to the Commission's minutes, three different people have served as the designated federal official at Commission meetings.

-- Drafting detailed minutes, the accuracy of which is certified by the Chairman, of each committee meeting with reference to attendance; matters discussed and conclusions reached; and reports received, issued and approved. We found that the AIDS Commission maintained minutes of its meetings. The Chairman of the Commission, however, did not certify to the accuracy of the minutes. By November 9, 1987, we had obtained the minutes of four Commission meetings that had been held up to that time: two were in final and two were in draft. As of November 30, 1987, the minutes of the two most recent Commission meetings were still being prepared.

GSA, the agency responsible for providing guidelines on and implementing the act, issued regulations (41 CFR Part 101-6) on advisory committee management in 1983. These regulations provide more specific guidance on the FACA requirements. For example, the regulations specify that

-- Agencies must develop a plan for attaining balanced committee membership. As mentioned previously, this requirement is currently the subject of a lawsuit with regard to the AIDS Commission.

-- An advisory committee must publish at least 15 days before a committee meeting a notice in the Federal Register which includes the name of the committee; the time, date, place and purpose for the meeting; a summary of the agenda; and a statement on whether the meeting is open or closed to the public -- if closed, the specific reasons also should be published. In exceptional circumstances, fewer than 15 days notice of a committee meeting may be given, but the reasons for a abbreviated notice period must be included in the published notice. We found that the AIDS Commission did publish notices of planned meetings in the Federal Register. For one meeting, the notice was published 8 days in advance with an explanation that the Commission needed the views of members of Congress as soon as possible. For another meeting, the notice was published 14 days in advance with no explanation. For the other four meetings, notices were published more than 15 days in advance as required by the regulations. In two cases, the meeting notices did not indicate whether the meetings were open or closed as the regulations require.

-- In order to close a meeting to the public, an advisory committee must submit a request to the agency head in sufficient time before publishing the meeting notice to allow a full review, including one by legal counsel, of the justification for closure. If the agency head approves the request, he or she must issue a determination that all or part of the meeting may be closed and cite the specific reasons for such closure. We found that the Commission followed the required procedures, and the Secretary of HHS approved its request for the one closed meeting.

The Commission is responsible for maintaining personnel records for its staff. However, many of these records were incomplete. For example, we found no documentation to show that staff appointments had been approved.

AIDS Commission Chronology

You asked that we examine the Commission's activities and develop a chronology of events. The AIDS Commission has been the subject of considerable controversy since it began. As explained to us by GSA officials, the Commission is an atypical committee because of its political nature and the sensitivity of the subject matter it covers. A chronology, as best we could determine it, follows.

On July 23, 1987, the President announced the formation of the AIDS Commission and named the members he intended to appoint in a statement issued by his Assistant for Press Relations. The Commission members chosen by the President met that day with the President, Secretary of Health and Human Services, Director of the National Institutes of Health, and Director of the National Institutes of Allergy and Infectious Diseases and other leaders in the health community. Also, on July 23, 1987, the Chairman appointed an acting executive director.

After the gathering on July 23, 1987, the Chairman and acting executive director began to establish the Commission's Washington office and plan the Commission's future activities. From late July until early September numerous actions were taken to get the Commission underway including (1) obtaining the facilities, office equipment and furniture, and supplies needed to support the Commission, (2) contracting with a private firm for the planning and support of the Commission's meetings, (3) hiring the acting executive director as permanent executive director on August 26, 1987, (4) hiring two professional and two administrative staff members on August 31, 1987, (5) planning visits to New York City and San Francisco, the two areas most affected by AIDS, so Commission members could gain further information on AIDS issues, (6) planning and arranging the agenda for Commission meetings, and (7) preparing a questionnaire for

obtaining members' views on the issues they believed should be addressed by the Commission.

During the first few days of September, before the Commission's members were officially sworn in, some members visited New York City and San Francisco. Contractor records showed members Dr. William Walsh, Dr. Burton Lee, John Cardinal O'Connor, Richard DeVos, Dr. Colleen Conway-Welch, John J. Creedon, Dr. Frank Lilly, and Chairman Dr. Eugene Mayberry participated in the New York City visit. Included on the itinerary was a presentation by the Sloan-Kettering Department of Infectious Diseases and visits with people with AIDS and institutions providing care for people with AIDS. Members Dr. Woodrow Myers, Dr. Cory SerVaas, and Chairman Mayberry participated in the San Francisco visit. They visited the San Francisco Health Department, the San Francisco AIDS Foundation, the Coming Home Hospice, and San Francisco General Hospital.

The next gathering of the Commission took place in Washington, D.C. on September 8, 9, and 10, 1987. On the evening of September 8, 1987, the day before the Commission members were officially sworn in, the members attended a gathering. Several members we interviewed described this gathering as a social event, not an official Commission meeting. According to some Commission members present, several members conversing at the gathering expressed the view that the Commission was not

moving fast enough and needed to develop an action plan for accomplishing its assigned functions.

On September 9 and 10, 1987, the Commission held a public meeting. This meeting was devoted to obtaining information on the government's role in combating the AIDS epidemic and selected interest groups' views on AIDS issues. The Chairman distributed a questionnaire to Commission members soliciting their views on the issues before the Commission. Six Commission members returned the questionnaire.

Some of the members' questionnaire responses criticized the Chairman's management style. One member said that the Commission was being run like a corporation with all decisions being made at the top and filtering down; he believed that all Commission matters of importance should have been discussed and voted on by the full Commission. One Commission member commented that better communication between the Chairman, Vice Chairman, and members was needed and that the most significant issue facing the Commission was the selection of another executive director and a public affairs officer. (The executive director had resigned on September 11, 1987.) This member also suggested that members should become more involved in planning and agenda development to assist the Chairman in fulfilling the Commission's mission.

On September 30, 1987, the Commission held a public meeting in Washington, D.C. to gather information from members of Congress on the status of legislation on AIDS issues. The week after this meeting, on October 7, 1987, the Chairman and Vice Chairman resigned. According to an associate of the former Chairman who worked with him on Commission matters, the former Chairman had grown frustrated with some members' persistent criticism of Commission operations. Because the former Chairman declined to be interviewed, we were unable to obtain a first hand account of the events that led up to his resignation. The former Vice Chairman resigned as a result of Dr. Mayberry's resignation and a feeling that he could no longer serve the Commission. The current Chairman was appointed on October 7, 1987, and the current executive director was appointed on October 16, 1987.

Department of Health and Human Services Support to the AIDS Commission

The executive order establishing the Commission required the Office of the Secretary to provide the Commission with any administrative services, funds, facilities, staff, and other support needed by the Commission to accomplish its functions.

The current Commission Chairman, current executive director, and former Vice-Chairmen rate highly the support services provided the Commission by HHS.

In all interviews with Commission members and staff, we were told of only one instance where a Commission request for support was not accommodated. The former executive director told us that she had made an informal arrangement with the supervisor of Public Health Service employee for the employee to be detailed to the Commission. The former executive director told us that this arrangement was not approved by HHS. The Assistant Secretary for Health told us that he had no knowledge of why the employee was not detailed and that his policy was to provide any support service requested by the Commission.

This concludes my statement, Mr. Chairman. We will be glad to answer any question you or other members may have.